U.S. Citizenship and Immigration Services

In Re: 09183903

DATE: JULY 14, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a global financial services firm, seeks to employ the Beneficiary as vice president, trader. It requests advanced degree professional classification for the Beneficiary under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director determined that the job opportunity described in the labor certification was not the same as that in the petition, as a result of which the labor certification was not valid for the job offered in the petition.

On appeal the Petitioner submits a brief and additional documentation, and asserts that the proffered position in the petition is the same job for which labor certification was approved.

Upon *de novo* review, we will withdraw the Director's decision. We will remand the case for further consideration of whether the labor certification supports the petition. We will also remand this case for further consideration of whether the Beneficiary has the experience and specific skills required by the labor certification to qualify for the job offered. This issue was not addressed in the Director's decision. The Director shall issue a new decision when the review of the foregoing issues is complete.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The I-140 petition was filed with USCIS on April 26, 2019, accompanied by a labor certification that was filed with the DOL on August 1, 2018, and certified in November 2018. The labor certification indicated that Beneficiary had been employed by the Petitioner since July 2016.

A. Job Opportunity as Described in the Labor Certification and the Petition

A labor certification for a specific job offer is valid for the particular job opportunity, the particular beneficiary, and the area of intended employment as stated on the labor certification. *See* 8 C.F.R. § 656.30(c)(2). A petitioner must establish its intent to employ the beneficiary in accordance with the terms and conditions of the labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg'l Comm'r 1966).

In this case the terms and conditions of the job opportunity are set forth:

- in section F of the labor certification (Prevailing Wage Information) which categorizes the proffered position under the SOC/O*NET code of 41-3031 with the occupational title of Securities, Commodities, and Financial Services, a skill level of Level II, and a prevailing wage of $108,555;
- in section G of the labor certification (Wage Offer Information) which indicates that the offered wage is $160,000 per year; and
- in section H of the labor certification (Job Opportunity Information) which indicates that the job title is Associate, Interest Rates Trading; that the minimum educational and experience requirements for the proffered position are either (1) a master's degree in financial engineering, mathematics, computer science, computational finance, or a related field, or a foreign educational equivalent, and two years of experience in algorithmic trading and fixed income trading, or a related job, or (2) a bachelor's degree in one of the identified fields of study, or a foreign educational equivalent, and five years of experience in the identified occupation or a related job; and that the specific skills described in section H.14[1] are also required. The job duties of the proffered position are described in section H.11 as follows:
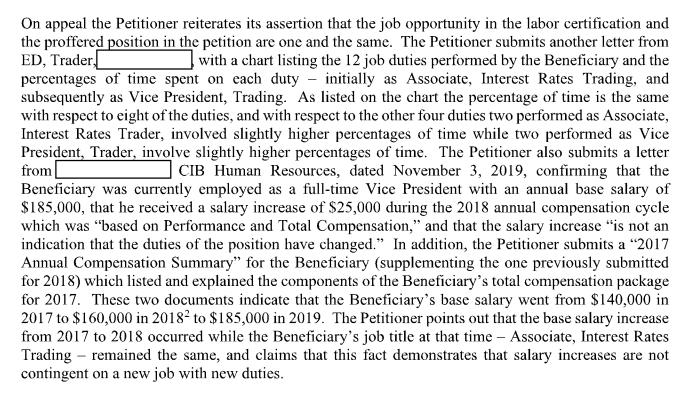
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[1] Section H.14 states as follows:
Skills required: Must have experience managing the risk of an interest rates trading book. Must have experience in fixed income trading and interest rates products (US Rates market structure, market drivers, risk metrics). Must have demonstrated understanding of algorithmic trading (exchange microstructure, order placement, heartbeat / kill-switches mechanisms). Must have demonstrated knowledge of US rates specific trading venues (BrokerTec, eSpeed, CME, Trad-X, iSwap, TrueEx) and their microstructure (order types, queue priority resolution). Must have demonstrated knowledge of object-oriented programming in C++. Must have experience with scripting languages (Python / Bash). Must have experience in statistical analysis. Must have experience with UNIX and software engineering tools (versioning-control like Git/Perforce). Must have demonstrated knowledge of the legal landscape for interest rates swaps, futures and US Treasuries (Dodd-Frank, SEF regulation, TRACE reporting, Reg-WJ. Employer will accept any amount of professional experience with the required skills.

Work as a trader in the [____] ATS (Automated Trading Strategies) group, primarily focused on interest rates derivatives.

Monitor ATS interest swap trading business and hedge the risk associated with this activity.

Operate and monitor pricing algorithms for interest rates swaps across the multiple modes of distribution (Request for quotes, central-limit orderbook, streaming).

Hedge the various risk dimensions of the electronic interest swap book using ATS hedging algorithms and by direct intervention in the interdealer-broker market.

Suggest and implement trade ideas based on previous experience in fixed income trading.

Report profit-and-loss and risk to senior management.

Operate and monitor the activity of [____] execution platform "QMM" for US Treasuries and Treasury futures: management of client orders, interaction with clients, ad-hoc code development (C++ / Git / UNIX / Bash).

Operate the market-making algorithms of the Raincoat electronic conditions (risk capacity, entry/exit levels, trading size, etc.). Work to improve the current implementations of the trading algorithms.

Review pricing and hedging algorithms in C++.

Develop tools to help optimize performance and improve franchise across [____]'s activities (Python/Bash).

Perform statistical analysis in Python on client flow and market dynamics. Facilitate expansion to new products and new platforms, which requires cooperative work and product development discussions with third party vendors and trading exchanges.

Ensure compliance with [____]'s policies and procedures, in accordance to the rules and regulating the trading of all transacted securities by the group (SEF rules, TRACE reporting, Reg-W).

The I-140 petition filed approximately nine months after the labor certification application included basic information about the proposed employment in Part 6, where the job title is identified as Vice President, Trader, and the wages are specified as $185,000 per year. The space for "Nontechnical Job Description" is blank, but the petition was accompanied by a letter from the Petitioner's executive director & assistant general counsel, [____] which noted that the position of Vice President, Trader, is a normal progression in employment from the position of Associate, Interest Rates Trading, and described the duties of Vice President, Trader, in exactly the same language used in the labor certification to describe the duties of Associate, Interest Rates Trading.

The Director issued a notice of intent to deny (NOID) which focused exclusively on the different job titles in the labor certification and the petition resulting from the Beneficiary's promotion from Associate, Interest Rates Trading, to Vice President, Trader. In response to the NOID the Petitioner submitted a letter from another company official – [____] Executive Director (ED), Trader – who stated that she was the Beneficiary's manager; that on February 1, 2019, he was promoted from Associate, Interest Rates Trading, to Vice President, Trader; that the Beneficiary's job duties remained the same; and that the change of job title is a normal progression in employment. The Petitioner also submitted a "2018 Annual Compensation Summary" for the Beneficiary which listed and explained the components of the Beneficiary's total compensation package, indicated that his base salary was

$160,000 in 2018, and that his annual base salary would be increased to $185,000 on February 1, 2019, upon his promotion to Vice President.

The Director denied the petition, stating that because of the Beneficiary's promotion and salary increase between the filing of the labor certification and the filing of the petition, the Beneficiary was now employed in a higher position and the labor certification for the Beneficiary's prior position was not valid for the job offer stated in the petition.

On appeal the Petitioner reiterates its assertion that the job opportunity in the labor certification and the proffered position in the petition are one and the same. The Petitioner submits another letter from ED, Trader,⎯⎯⎯⎯⎯⎯, with a chart listing the 12 job duties performed by the Beneficiary and the percentages of time spent on each duty – initially as Associate, Interest Rates Trading, and subsequently as Vice President, Trading. As listed on the chart the percentage of time is the same with respect to eight of the duties, and with respect to the other four duties two performed as Associate, Interest Rates Trader, involved slightly higher percentages of time while two performed as Vice President, Trader, involve slightly higher percentages of time. The Petitioner also submits a letter from ⎯⎯⎯⎯⎯⎯ CIB Human Resources, dated November 3, 2019, confirming that the Beneficiary was currently employed as a full-time Vice President with an annual base salary of $185,000, that he received a salary increase of $25,000 during the 2018 annual compensation cycle which was "based on Performance and Total Compensation," and that the salary increase "is not an indication that the duties of the position have changed." In addition, the Petitioner submits a "2017 Annual Compensation Summary" for the Beneficiary (supplementing the one previously submitted for 2018) which listed and explained the components of the Beneficiary's total compensation package for 2017. These two documents indicate that the Beneficiary's base salary went from $140,000 in 2017 to $160,000 in 2018[2] to $185,000 in 2019. The Petitioner points out that the base salary increase from 2017 to 2018 occurred while the Beneficiary's job title at that time – Associate, Interest Rates Trading – remained the same, and claims that this fact demonstrates that salary increases are not contingent on a new job with new duties.

We conclude that the Director's decision to deny the petition was deficient because it did not fully assess the evidence in the record, which has now been augmented by the materials submitted on appeal. The Director's decision was based on the Beneficiary's promotion from one job title to another and his associated salary increase without properly analyzing the Petitioner's claim that the job duties, and therefore the proffered position in these proceedings, remained the same from one job title to the next. Therefore, we will withdraw the Director's decision.

At the same time, there are deficiencies in the current record which preclude us from making a positive determination that the job opportunity described in the labor certification is the same as that described in the petition. While the Petitioner asserts that the Beneficiary's job duties were unaffected by his change of job title from Associate, Interests Rates Trading, to Vice President, Trader, a promotion from associate to vice president appears substantial and raises questions of whether the Beneficiary

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[2] The Beneficiary's total compensation package in 2017 was $250,000, consisting of the base salary of $140,000 and incentive awards of $110,000 (including $88,000 in cash and $22,000 in restricted stock units). The Beneficiary's total compensation package in 2018 was $275,000, consisting of the base salary of $160,000 and incentive awards of $115,000 (including $92,000 in cash and $23,000 in restricted stock units).

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may have assumed some management or other higher level responsibilities that are not reflected in his list of job duties. On both the labor certification and the petition the proffered position was identified under the standard occupational code (O*NET-SOC) of 41.3031, which encompasses the occupational titles of securities, commodities, and financial services sales agents. It is not clear from the record whether the Petitioner, when advertising and hiring generally for the positions of Associate, Interest Rates Trading, and Vice President, Trader, imposes the same education, experience and special skills requirements for both positions, and whether both positions would receive a wage under the same O*NET code wage level resulting in the same wage determination. If, as Vice President, the Beneficiary would supervise other workers, that too could change the required prevailing wage determination. The record does not contain any job advertisements, or other related evidence, to make that comparison. Thus, it is not clear whether U.S. workers would be apprised of the actual job, its requirements, or position description. As such, U.S. workers may not have been given proper consideration for the job at issue in this proceeding during the recruitment period of the labor certification process.

For the reasons discussed above, we will remand this matter for consideration of these and any other factors the Director may deem pertinent in determining whether the job opportunity described in the labor certification is the same as that described in the petition, and thus whether the labor certification is valid for the petition.

B. Requirements of the Labor Certification and the Beneficiary's Qualifications

To qualify for classification as an advanced degree professional the Beneficiary must have a U.S. degree or a foreign equivalent degree above that of baccalaureate, as defined in 8 C.F.R. § 204.5(k)(2). The Beneficiary must also meet the specific educational, training, experience, and other requirements of the proffered position as stated on the labor certification. *See* 8 C.F.R. § 204.5(k)(4). All requirements must be met by the priority date of the petition,[3] which in this case is August 1, 2018. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977).

As previously discussed, the labor certification indicates that the minimum requirements for the proffered position are either (1) a master's degree in financial engineering, mathematics, computer science, computational finance, or a related field, or a foreign educational equivalent, and two years of experience in algorithmic trading and fixed income trading, or a related job, or (2) a bachelor's degree in one of the identified fields of study, or a foreign educational equivalent, and five years of experience in the identified occupation or a related job; plus the specific skills described in section H.14 of the labor certification. With its initial evidence the Petitioner submitted copies of the Beneficiary's academic record from [   ] University in [   ] Pennsylvania, which shows that he earned a master of science degree in computational finance in December 2012. Thus, the Beneficiary meets the primary educational requirement for the job under the terms of the labor certification and must establish two years of qualifying experience to meet the associated experience requirement, in addition to the specific skills requirement in section H.14.

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[3] The priority date of a Form I-140 petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

The labor certification indicates that the Beneficiary did not gain any qualifying experience with the Petitioner in a substantially comparable position to the job offered in this proceeding (section J.21), and claims that the Beneficiary gained his qualifying experience in two positions with other companies before starting work with the Petitioner in July 2016. The first position was as "analyst – fixed income trader" with[_____]Securities USA[_____]in[_____]from March 2013 to March 2014. The second position was "associate – company algorithm monitor & quantitative technologist" with[____]USA LLC[____]in[_____]from March 2014 to July 2016. The record includes letters from two individuals claiming to have held high positions in the respective companies who state that the Beneficiary was an employee, confirm his dates of service, and describe his job duties. However, neither of these individuals is currently employed by[_____]or[____] and their letters do not come from[_____]or[____] Thus, neither letter comports with pertinent regulations which require that letters submitted as evidence of a Beneficiary's qualifying experience must be from current or former employers and give the name, address, and title of the letter's author, in addition to describing the beneficiary's job duties. *See* 8 C.F.R. §§ 204.5(g)(1). The Petitioner also submits a brief letter from a human resources representative of[_____]confirming that the Beneficiary was employed as an analyst in the years 2013-2014, but it provides no details about the Beneficiary's job duties. Thus, it likewise fails to comply with regulatory requirements. Moreover, an employment verification letter from[_____]alone would not establish that the Beneficiary meets the minimum experience requirement of the labor certification because the Beneficiary's experience at[_____]lasted less than two years.

For the reasons discussed above, the Petitioner has not established that the Beneficiary has at least two years of qualifying experience, as required by the labor certification when paired with a master's degree to qualify for the proffered position. Since the Beneficiary's qualifying experience was not addressed by the Director in his decision, we will remand the matter for consideration of this issue, as well as the specific skills requirement in section H.14 of the labor certification.

III. CONCLUSION

We will remand this case to the Director for further consideration of whether the labor certification is valid for the petition and whether the Beneficiary meets the experience and specific skills requirements of the labor certification to qualify for the job offered. The Director may request additional documentation from the Petitioner and following the Petitioner's response, or the expiration of the response period, shall issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.